No. 234

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SUPREME COURT OF THE UNITED STATES.

OCTOBER 1956 TERM.

CARLISLE COOPER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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INDEX.

	Page
(a) The opinions below	2
(b) Statement of grounds of jurisdiction	2
(c) Question presented for review	2
(d) Constitutional provisions and statutes relied on	3
(e) Statement of case	4
(f) Jurisdiction of the courts below	7
(g) Reasons for granting the writ	7
Conclusion	12
Appendix	15
Judgment	15
Opinion of Court of Appeals	16

Cases Cited.

Counselman v. Hitchcock, 142 U. S. 547, 563	8
Torras v. Stradley, 103 F. Supp. 737 (D. C. Ga., 1941)	9
U. S. v. Morton Salt Co., 338 U. S. 632 (1950)	11
U. S. v. Smith, 87 F. Supp. 293 (D. Conn., 1949)	9
Walker v. Johnston, 312 U. S. 275 (1941)	7
Wood v. U. S., 128 F. 2d 265 (App. D. C., 1942)	8

Statutes Cited.

Adminstrative Procedure Act of 1946, Section 6 (a), 5 U. S. C., Section 1005 (a), 60 Stat. 240	3, 9
18 U. S. C., Rule 44	7
18 U. S. C., Rule 37 (c)	2
18 U. S. C., Rule 5 (b)	7
18 U. S. C., Section 1621	1, 4
18 U. S. C., Section 3231, 62 Stat. 826	7
26 U. S. C., Section 3614	4
28 U. S. C., Section 1254, 62 Stat. 928	2
28 U. S. C., Section 1291, 65 Stat. 726	7

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Miscellaneous.

Congressional Record, Volume 92, Part II, page 2156 10
Congressional Record, Volume 92, Part V, page 5652 10
United States Constitution, Amendment VI 3, 7

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully prays this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered June 8, 1956, in which his conviction for violation of Section 1621 of Title 18, United States Code, was affirmed.

(a) THE OPINIONS BELOW.

The opinion of the Court of Appeals has not yet been officially reported. A copy thereof is hereto annexed. See pp. 16 to 22, infra, of the Appendix. The District Court did not write an opinion. Copy of the judgment of the Court of Appeals is also annexed at p. 15 of the Appendix.

(b) STATEMENT OF GROUNDS OF JURISDICTION.

(i) The judgment of the Court of Appeals was rendered and entered on June 8, 1956.

(ii) No motion for rehearing has been filed in the Court of Appeals, and there has been no order granting an extension of time in which to file this petition.

(iii) The jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1254, 62 Stat. 928; and 18 U. S. C., Rule 37 (c)

(c) QUESTION PRESENTED FOR REVIEW.

Can a defendant be required to stand trial on perjury charges arising out of a hearing conducted by Agents of the Internal Revenue Service where the defendant voluntarily appeared but was not then and there advised of his right to counsel as guaranteed to him under the Sixth Amendment to the Constitution of the United States and the Administrative Procedure Act of 1946?

Petitioner was convicted below of perjury for allegedly giving false answers at a hearing conducted by Internal Revenue Agents to investigate income tax liability of Petitioner and others.

At said hearing, petitioner was not represented by counsel nor was petitioner at or prior to the hearing advised of his right to counsel by an Internal Revenue Agent or any representative of the Government.

(d) CONSTITUTIONAL PROVISIONS AND STATUTES RELIED ON.

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Administrative Procedure Act of 1946, Section 6 (a), 5 U. S. C., Section 1005 (a); 60 Stat. 240:

"Any **person compelled to appear in person** before any agency or representative thereof **shall be accorded the right to be accompanied, represented, and advised by counsel** or, if permitted by the agency, by other qualified representative. **Every party shall be accorded the right to appear** in person or **by or with counsel** or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall

be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding." (Emphasis added.)

(e) STATEMENT OF CASE.

A one count indictment charged petitioner with the violation of the general perjury statute, Title 18, U. S. C., Section 1621. The substance of the indictment was that on July 1, 1952, petitioner appeared before Agents of the Bureau of Internal Revenue, at St. Louis, Missouri, who were conducting an investigation pursuant to former Section 3614 of Title 26, U. S. C., of the correctness of income tax returns and tax liability for the years 1945 to 1948, inclusive, of Adolph C. Burger, Andy Burger Motors, a corporation, and of petitioner, and that petitioner swore falsely in answering questions propounded to him at such time. There were nine specific Assignments of Perjury set out in the indictment which had to do generally with the denial by petitioner that he had received any sums of money over and above the invoice price in connection with the sale of used or new automobiles at Andy Burger Motors during the years 1945 through 1948 (R. 1-5).

It appeared from the evidence that petitioner had first been employed by Mr. Burger in the fall of 1940. He continued his employment as a salesman for about a year and a half and then was made Sales Manager and, shortly after that, in 1941, was made Assistant Manager of Community Motors. In 1945 he became General Manager of Andy Burger Motors, Inc., another auto dealership and he continued in that capacity (R. 133). Petitioner finished two years of high school and went to work at the age of 15, holding various jobs until he first got into the automobile business in 1933 (R. 132, 133).

The proceeding on July 1, 1952, was conducted by Special Agent Fendorf of the Intelligence Division of the

Bureau of Internal Revenue at his office (R. 26, 38, 72-73). He entered the case about May, 1949, and as of August 15, 1952, was still working on it. The investigation included the income tax liability of petitioner as well as Mr. Burger and Andy Burger Motors (R. 30). Mr. Fendorf had contacted about two hundred customers of Andy Burger Motors in the course of the investigation (R. 68).

Petitioner was not accompanied by, nor represented by legal counsel at the hearing on July 1, 1952 (R. 38). Counsel for the Government at the trial stipulated that at said hearing (July 1, 1952) **petitioner was not advised of his right to counsel** under the Sixth Amendment to the Constitution of the United States (R. 35), although he was informed of his rights under the Fifth Amendment (R. 39, 40). The transcript of the hearing showed the following occurred (R. 39-40):

> "Q. 14. Mr. Cooper, we want to call your attention to the provisions in the Federal Constitution which provides that a witness cannot be compelled to testify against himself. Are you familiar with that provision?
>
> A. 14. I don't know just exactly what you mean that I can't be compelled to testify against myself. **Is this testimony I am giving?**" (Emphasis added.)
>
> "Q. 15. Do you understand that you may decline to answer any question if you feel that your answer will tend to incriminate you under some law of the United States?
>
> A. 15. Yes, I understand that.
>
> Q. 16. And do you understand further that any statement that you do make can be used against you in any proceeding hereinafter brought by the United States, either civil or criminal?
>
> A. 16. I understand that."

The following also appeared in the transcript of the hearing (R. 62, 64):

"Q. 191. Has your appearance here today been voluntary on your part?

A. 191. It has.

Q. 192. Were you compelled to appear for this interview?

A. 192. I was **asked** to appear for it. (Emphasis added.)

Q. 193. And you came of your own free will and accord.

A. 193. I certainly did."

* * * * * * *

"Q. 199. Did you talk to him (Mr. Burger) before you came here today?

A. 199. No. Mr. Burger is out of town. I had no reason to talk to him. **I didn't know what you had in mind. I thought you wanted to talk about my income tax or deductions. I had no idea you had this in mind.**" (Emphasis added.)

When the transcript of the hearing, the sworn interview, was offered in evidence petitioner objected as follows (R. 35):

"Mr. Dyer: We want to object to the introduction in evidence of Government's Exhibit 1-B for the reason that it was obtained from the defendant in violation of his rights under the Sixth Amendment to the Constitution of the United States, because he was not advised then and there of his right to counsel, * * *."

The Court overruled this objection and admitted the exhibit.

Petitioner was found guilty and, on appeal, his conviction was affirmed.

(f) JURISDICTION OF THE COURTS BELOW.

The District Court had jurisdiction under 18 U. S. C., Section 3231, 62 Stat. 826. The Court of Appeals had jurisdiction under 28 U. S. C., Section 1291, 65 Stat. 726.

(g) REASONS FOR GRANTING THE WRIT.

The indictment in this case was based on testimony given by petitioner at a hearing conducted by a Special Agent of the Intelligence Division of the Internal Revenue Service. It was urged by petitioner in the Court of Appeals that his rights under the Sixth Amendment to the United States Constitution and the Administrative Procedure Act of 1946 were violated at this hearing. Petitioner urged that his right to legal counsel was effectively denied because of his ignorance of the nature of the proceeding and the failure of the Government Agents to inform him of his right to counsel.

There can, of course, be no question of an accused person's right to counsel at all stages of a criminal proceeding. **United States Constitution Amendment VI; Johnson v. Zerbst, 304 U. S. 458, (1938).** Nor can there today be any question of the necessary concomitant of that rule—the right of an accused person to be advised of his right to counsel. **Walker v. Johnston, 312 U. S. 275 (1941).** The duty to advise of this right is now formalized in the Federal Rules of Criminal Procedure from a person's first appearance before a U. S. Commissioner **[18 U. S. C., Rule 5 (b)]** through every stage of the proceeding (18 U. S. C., Rule 44). The right to counsel in criminal proceedings and duty to advise the accused of the right to counsel have thus been expressly and specifically established in criminal proceedings not only before a petit jury but in preliminary proceedings prior to the petit jury trial.

The importance of counsel and the duty to advise of the right to counsel in the very earliest and inchoate stages of

a criminal investigation were recognized and carefully defined by the late Justice Rutledge when a member of the Court of Appeals of the District of Columbia in **Wood v. U. S., 128 F. 2d 265 (App. D. C., 1942).** As Justice Rutledge pointed out, the very time that a person most needs counsel and most needs to know of this right is during the confused investigatory phase as, for example, at the preliminary hearing. It is then that damaging thoughtless remarks under oath may very likely be wrung from him to his certain future condemnation at what would become the mere formality of a trial:

> "* * * The aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary inquisition which would squeeze out conviction or prejudice by means unconstitutional if used at the trial" (128 F. 2d, l. c. 271).

The examination of the petitioner in this case by the Internal Revenue Agents was in essence criminal in nature. The hearing was being conducted by an Agent of the Intelligence Division (R. 26), which was formed and exists primarily for the purpose of investigating and handling criminal offenses. **It is evident that the entire purpose of the Agents was to impale petitioner on the one or the other horn of a dilemma, making him either confess to information that they had received from others which would have convicted him of income tax evasion or deny the truth of such information under oath and be prosecuted for perjury.**

The Court of Appeals in its opinion disposed of this contention by citing **Counselman v. Hitchcock, 142 U. S. 547, 563,** and holding that Cooper at the hearing or sworn interview on July 1, 1952 was not an accused within the meaning of that case. But the **Counselman** case arose under the Fifth Amendment to the Constitution and what the Court there said with regard to the Sixth Amendment was dictum. Important constitutional rights should not be de-

termined by dictum and it is respectfully urged that this Court should grant a writ of certiorari to review the full extent of protection accorded by the Sixth Amendment.

Aside from his right to be advised of his right to counsel under the Sixth Amendment, petitioner urged that his rights under **Section 6 of the Administrative Procedure Act of 1946, 5 U. S. C., Section 1005 (a)**, were also violated. That Section reads, in part:

> "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. **Every party** shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding . . ." (Emphasis added.)

Two District Court decisions, **U. S. v. Smith, 87 F. Supp. 293 (D. Conn., 1949)**, and **Torras v. Stradley, 103 F. Supp. 737 (D. C. Ga., 1941)**, have applied Section 6 of the Administrative Procedure Act to agents' hearings similar to the one in this case.

The Court of Appeals below, in affirming the judgment of conviction, only assumed the applicability of the Administrative Procedure Act to the proceeding; it did not answer the question. For this issue alone the Supreme Court of the United States should grant certiorari because of the tremendous importance which such Internal Revenue Agents' hearings have acquired in the lives of American citizens. Basic constitutional rights of citizens should always be protected whether before a Court, a Bureau or an Agency.

Petitioner urged below that it was the intent of Congress to insure that the rights of a person in an accusatory administrative proceeding would be identical with the rights of an accused person in a judicial criminal proceeding. As

Senator McCarran, the Senate sponsor of the Bill that became the Administrative Procedure Act, said in explaining it on the Senate floor:

> ". . . In an accusatory case, where one is accused of something, he may be required to appear by attorneys so as to defend him in his rights." **(Congressional Record, Volume 92, Part II, page 2156.)**

Representative Walter, the House sponsor, in discussing the section of the Bill which became Section 1005 (a), said:

> ". . . The representation of counsel contemplated by the Bill means **full representation as the term is understood in the courts of law." (Congressional Record, Volume 92, Part V, page 5652.)** (Emphasis added.)

And Representative Gwynne of Iowa, also explaining the Bill, said (at page 5656):

> "It is an attempt to bring into the practice of these bureaus and tribunals **those principles of due process that we understand and that have been enforced in the courts.**" (Emphasis added.)

From these comments made in the congressional debate at the time the Administrative Procedure Act was enacted, it is reasonable to conclude that Congress intended that **the same principles of due process should apply to administrative proceedings** as have been **determined by this Court to be applicable to judicial proceedings. Due process** in such an **administrative proceeding** would then mean that the person examined should not only be afforded (1) the opportunity of being represented by counsel (Johnson v. Zerbst); but also (2) that he be advised of his right to counsel (Walker v. Johnson).

The Court of Appeals below, in dealing with this question, said:

> "Cooper made no request for counsel, and there is no basis for ruling that he was denied the right to

have counsel orthat he was under any compulsion to appear or to give testimony at the hearing."

The Court of Appeals apparently was of the opinion that Cooper waved his right to counsel by failing to request it. This in itself is a proper question for the Supreme Court of the United State to determine, whether the burden is upon the person coning before the administrative agent to know that he has the right to counsel or whether the Agent must advise the person. Certainly a person who does not know of hs right to counsel should not be held to have waived tha right by failing to request counsel. The Court of Appeals below seems to have been of the further opinion that petitioner had to be under some special type of compulsion to appear or give testimony at the hearing before the right to counsel would accrue to him. This raises the serious question whether Congress, in wording Section 6 of the Administrative Procedure Act as it did, intended that a witness, by waiving the necessity of service of processon him by the marshal or other proper officer, would also waive his right to counsel. This would hardly be in harmony with the spirit and purposes of the Act; it would place upon a citizen who, not knowing any of his rights, cooperatively subjects himself to a hearing without being served with a subpoena, the undeserved burden and penalty of unwitingly causing himself to be deprived of the more valuable right of the advice of counsel. **It would penalize a cooperative witness and reward a reluctant one.**

In **U. S. v. Morton Salt Co., 338 U. S. 632 (1950)**, the Supreme Court said:

"The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as **a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their**

> **offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights."** (Emphasis added.)

Petitioner urged below that an Internal Revenue Agent could advise a witness or party coming before him of his right to counsel as afforded under the Sixth Amendment and the Administrative Procedure Act in a simple manner. The proper time for the first advice of such right to the party or witness by the Agent would be prior to his attendance. Then, at the commencement of the hearing, in the presence of the stenographic reporter, a reference to the giving of such advice could easily be made for the purposes of the record, whereupon the party or witness would have the opportunity to acknowledge or deny such earlier advice of his constitutional and statutory right to counsel. This procedure would not in any way interfere unduly with the efficient and economical operation of the Government, while it would effectively and completely safeguard the constitutional and statutory rights of the citizen.

CONCLUSION.

The Courts below have rendered a decision on an important question of federal law involving rights protected by the Constitution and Congressional enactment. The Courts of Appeals, as the Court of Appeals below, seem hesitant to answer whether Section 6 of the Administrative Procedure Act of 1946 applies to the hearings conducted by Agents of the Internal Revenue Service. The questions herein sought to be certified have not been settled by the Supreme Court of the United States. With the growing importance of the hearings of adminstrative agents, and, in particular the hearings of Agents of the Internal Revenue Service, the questions involved have

become of such significance that they should be answered by the Supreme Court.

1) Does the Administrative Procedure Act of 1946 apply to hearings of this character before Intelligence Agents of the Bureau of Internal Revenue?

2) If the Administrative Procedure Act does apply, does a person appearing before such agent or agents surrender his right to counsel guaranteed under the Act by voluntary appearance?

3) Is a person thus appearing under compulsion of subpoena or other process entitled to rights not guaranteed to those appearing voluntarily?

4) Does the phrase "every party" as set forth in Section 1005 (a) mean the accused?

5) Was it not the intent of Congress in the enactment of the Administrative Procedure Act to grant to the accused in such administrative proceedings:

a) the right to counsel (Johnson v. Zerbst) and

b) the right to be advised of the opportunity to engage or be represented by counsel (Walker v. Johnston).

6) Does the doctrine of "right to be advised of counsel" under Walker v. Johnston, as guaranteed under Sixth Amendment to Constitution of United States, apply to hearings where recorded interviews **under oath** are taken before Intelligence Agent of Internal Revenue Service?

None of these important questions has been decided by the Supreme Court of the United States. The Administrative Procedure Act of 1946 can mean nothing in protecting the rights of "witnesses" or "parties" in accusatory proceedings before agencies and bureaus unless and until

this Court meets these issues squarely and answers these questions so that the rights intended to be vested in each American citizen may for the first time actually come into effective existence.

Accordingly, petitioner asks that this Court issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

GEORGE C. DYER,
721 Olive Street,
St. Louis 1, Missouri,
Attorney for Petitioner.

APPENDIX.

(Judgment.)

United States Court of Appeals for the
Eighth Circuit.

No. 15464. September Term, 1955.
Friday, June 8, 1956.

Carlisle Cooper,
Appellant,
vs.
United States of America.

Appeal From the United States District Court for the
Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered and Adjudged by this Court that the defendant in the Court below, Carlisle Cooper, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

June 8th, 1956.

(Opinion of Court of Appeals.)

United States Court of Appeals
For the Eighth Circuit.

No. 15,464.

Carlisle Cooper,	Appellant,	Appeal from the United States District Court for the Eastern District of Missouri.
vs.		
United States of America,	Appellee.	

[June 8, 1956.]

George C. Dyer (Ray T. Dreher, James F. McCarthy and Edward E. Murphy, Jr., were with him on the brief), for Appellant.

Robert E. Brauer and W. Francis Murrell, Assistant United States Attorneys (Harry Richards, United States Attorney, was with them on the brief), for Appellee.

Before Sanborn, Woodrough and Vogel, Circuit Judges.

Sanborn, Circuit Judge.

Carlisle Cooper entered a plea of not guilty to an indictment based on 18 U. S. C., § 1621, charging that on July 1, 1952, at St. Louis, Missouri, during an official investigation by an Internal Revenue Agent of the office of the Internal Revenue Agent in Charge at St. Louis, and a Special Agent of the Intelligence Division of the Bureau of Internal Revenue, of Cooper's income tax liability and that of Andy Burger and Andy Burger Motors, a corporation, for the years 1945 to 1948, inclusive, he committed perjury by stating, while under oath, that neither he nor Andy Burger Motors, of which he was manager, during the period 1945 through 1948 received any money, in the sale

of motor vehicles, in excess of the invoice price representing the amount for which the vehicles were sold. The case was tried to a jury, which returned a verdict of guilty. The District Court imposed sentence, and Cooper has appealed.

At the close of the evidence, Cooper moved for a judgment of acquittal, and, after verdict, he renewed his motion. He asserts that the trial court erred in denying the motions for a judgment of acquittal, for the following reasons: (1) that the evidence failed to prove that an oath had been taken before a competent officer in a case in which a law of the United States authorized an oath to be administered; (2) that the sworn statement upon which the indictment is based was obtained in violation of Cooper's rights under the Sixth Amendment to the Constitution of the United States and the Administrative Procedure Act, in that he was not advised of his right to counsel at the interview on July 1, 1952; and (3) that by the denial of a requested instruction the court permitted the jury to speculate upon Cooper's guilt, based on "unsworn" statements.

The essential elements of the crime of perjury as defined in 18 U. S. C., § 1621, are (1) an oath taken before a competent tribunal officer, or person, (2) in a case in which a law of the United States authorizes an oath to be administered, and (3) a false statement willfully made as to a material matter. **United States v. Debrow**, 346 U. S. 374, 375-376.

The sufficiency of the evidence to sustain a finding of the willful making by Cooper of false statements is not subject to question.

Cooper contends that the Government failed to prove that he had taken an oath before a competent officer or person in a case in which a law of the United States authorized an oath to be administered.

Section 3614 (a) of Title 26, U. S. C., provided that:

> "The Commissioner, for the purpose of ascertaining the correctness of any return * * * is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, * * * and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

To establish the authority of Special Agent Robert M. Fendorf, of the Intelligence Division of the Bureau of Internal Revenue, who, together with Internal Revenue Agent John F. Corkery, was making an investigation of the tax liability of Cooper, Andy Burger and Andy Burger Motors, to conduct the hearing on July 1, 1952, and to administer an oath to Cooper, the Government offered in evidence, as Exhibit 1-A, the following letter written upon the official stationery of the office of the Commissioner of Internal Revenue, Treasury Department, which letter Special Agent Fendorf testified he had received in the ordinary course of business shortly after his appointment as a Special Agent:

"Washington 25,
October 12, 1945.

"Mr. Robert M. Fendorf,
Special Agent, Bureau of Revenue.

"Dear Mr. Fendorf:

"In addition to the other duties assigned to you as Special Agent, you are hereby authorized and directed under the provisions of Section 3614 of the Internal Revenue Code, to examine any books, papers, records

or memoranda bearing upon matters required to be included in any return required under the Internal Revenue laws.

"Under these provisions you may require the attendance of any person rendering a return, or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

Very truly yours,

Wm. Sherwood,
[Acting] Commissioner."

The defendant objected to the introduction in evidence of the letter on the grounds that it was not properly identified, that there was no indication that it was a genuine document, that there was no proof of the signature, that the letter was not under seal, that it was not properly authenticated, and that it was incompetent. The court overruled the objection. Fendorf was asked whether he had authority to administer an oath. He answered in the affirmative. The court refused to strike his answer. He testified that Cooper was sworn by him and his statement taken in shorthand and later transcribed and submitted to Cooper, who made some minor corrections, signed the statement, and was re-sworn by Fendorf.

Rudolf H. Hartmann, as a witness for the Government, testified that from 1949 to 1952 he was Senior Special Agent in charge of the Special Agents' Office, Intelligence Division of the Bureau of Internal Revenue in St. Louis; that during those years he directed the investigations performed by the Intelligence Agents from his office; that he knew Fendorf; that during the year 1952 and prior thereto Fendorf was a Special Agent with the Bureau of Internal Revenue and under Hartmann's supervision; and that the

letter, Exhibit 1-A, was a form letter which was given to each Special Agent, signed by the Commissioner of Internal Revenue. A request by the defendant that Hartmann's testimony as to the letter being signed by the Commissioner be stricken on the ground of lack of foundation, was overruled. Hartmann then testified that he had seen the letter before; that each Special Agent had one; that he had received the letter in the usual and ordinary course of business in his office; that he gave it to Fendorf; and that during the years 1949, 1950, 1951 and 1952 Fendorf performed an investigation under Hartmann's supervision or direction relating to the tax liabilities of Adolph C. Burger (also known as Andy Burger), Andy Burger Motors, and Carlisle Cooper, in St. Louis.

We are urged to rule that there was no adequate evidentiary basis for a finding that Fendorf had authority to conduct the investigation on July 1, 1952, or to administer an oath to Cooper, and that, for that reason, the District Court should have directed a verdict of acquittal. We think that there was sufficient evidence to sustain the finding implicit in the jury's verdict that Special Agent Fendorf was conducting an investigation which he was authorized by law to conduct, and that he had administered an oath which he was authorized to administer. This conclusion, we think, is supported by implications to be drawn from such cases as **Caha v. United States**, 152 U. S. 211, 216-222; **Wynne v. United States**, 217 U. S. 234, 246-247; **Stern Bros. & Co. v. Burnet**, 8 Cir., 51 F. 2d 1042, 1045-1046; **Concrete Engineering Co. v. Commissioner of Internal Revenue**, 8 Cir., 58 F. 2d 566, 567-568. Moreover, "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." **United States v. Chemical Foundation, Inc.**, 272 U. S. 1, 14-15. See also, 20 Am. Jur., Evidence, § 172, page 179.

Cooper, at the hearing before the Government Agents on July 1, 1952, was informed by Special Agent Fendorf that he could decline to answer any question if he felt that his answer might tend to incriminate him, and that any statement he made could be used against him in a proceeding, either civil or criminal, brought by the United States. Cooper was not advised that he had a right to have and to consult with counsel. He contends that the failure of the Government Agents in that regard was a violation of his rights under the Sixth Amendment to the Constitution of the United States and under the Administrative Procedure Act, 5 U. S. C., § 1005 (a).

Cooper's appearance before the Government Agents on July 1, 1952, was voluntary and the statements made by him to them were voluntarily made. Assuming the applicability of the Administrative Procedure Act to the proceeding, Section 1005 (a) of 5 U. S. C. relates to a person compelled to appear. It provides: "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." Cooper made no request for counsel, and there is no basis for ruling that he was denied the right to have counsel or that he was under any compulsion to appear or to give testimony at the hearing.

So far as the right to counsel under the Sixth Amendment is concerned, the Amendment applies to "a criminal prosecution against a person who is accused and who is to be tried by a petit jury." **Counselman v. Hitchcock**, 142 U. S. 547, 563. Cooper at the hearing or interview on July 1, 1952, was not an accused. He was merely being asked to give truthful and pertinent information as to his own tax liability and that of his associates. The failure of the Government Agents to inform him that he might have the advice and assistance of counsel did not entitle him to a directed verdict of acquittal.

There is, we think, no merit in Cooper's contention that, under the form of oath administered, he was not under oath as to his answers relating to the taxable income of Andy Burger Motors. He swore that his answers to the questions propounded to him in the matter of the income tax liability of A. C. Burger and also in the matter of his own tax liability would be the truth, the whole truth, and nothing but the truth. The record shows that his own income and the income of A. C. Burger during the years in question were related to and largely dependent upon the earnings of Andy Burger Motors, of which he was manager and A. C. Burger was apparently the owner. Cooper testified at the trial that at the hearing on July 1, 1952, "He considered himself under oath as to every question that was asked of him appearing in the exhibit [his sworn statements]," and that "to the best of his knowledge the answers to the questions contained in the exhibit were truthful."

Our conclusion is that, under the evidence and the applicable law, the question of the guilt or innocence of Cooper was one of fact for the jury, and that no reversible error was committed by the trial court.

The judgment appealed from is affirmed.

A true copy.

Attest:

Clerk U. S. Court of Appeals, Eighth Circuit.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Constitution and statues involved	2
Statement	3
Argument	7
Conclusion	9

CITATIONS

CASES:

Cooper v. *United States*, 350 U. S. 957	4
Counselman v. *Hitchcock*, 142 U. S. 547	7
Gilmore v. *United Sates*, 129 F. 2d 199, certiorari denied, 317 U. S. 631	7
Hanson v. *United States*, 186 F. 2d 61	7
Johnson v. *Zerbst*, 304 U. S. 458	8
Torras v. *Stradley*, 103 F. Supp. 737	8
Walker v. *Johnson*, 312 U. S. 275	8
Wood v. *United Stats*, 128 F. 2d 265	8

CONSTITUTION AND STATUTES:

Constitution of the United States, Sixth Amendment	2
Administrative Procedure Act, c. 324, 60 Stat. 237:	
Sec. 2(g) (5 U.S.C. 1952 ed., Sec. 1001(g))	8
Sec. 6(a) (5 U.S.C. 1952 ed., Sec. 1005(a))	3, 7
18 U. S. C., Section 1621	2
Internal Revenue Code of 1939, Sec. 3614(a) (26 U.S.C. 1952 ed., Sec. 3614(a))	7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 234

CARLISLE COOPER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 16-22) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1956. (Pet. 15.) The petition for a writ of certiorari was filed on July 6, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTON PRESENTED

Whether petitioner's conviction for perjury committed at a hearing conducted by agents of the Internal Revenue Service is precluded by the fact that he was not then represented by counsel.

CONSTITUTION AND STATUTES INVOLVED

Constitution of the United States, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

18 U. S. C.:

> Sec. 1621. *Perjury generally.*
>
> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

Administrative Procedure Act, c. 324, 60 Stat. 237:

> Sec. 6. Except as otherwise provided in this Act—
>
> (a) *Appearance.*—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.
>
> * * * * *

(5 U. S. C. 1952 ed., Sec. 1005 (a).)

STATEMENT

On February 19, 1953, petitioner was indicted in the United States District Court for the Eastern District of Missouri for having knowingly committed willful and corrupt perjury in violation of 18 U. S. C. 1621. The indictment alleged in pertinent part that peti-

tioner, having been duly sworn, falsely testified (1) that the invoice price of vehicles sold by Andy Burger Motors, Inc. during the years 1945 through 1948 in each instance represented the true amount for which such vehicles were sold, and (2) that upon the sale of either used or new cars, neither petitioner nor Andy Burger Motors, Inc., had ever received any sum of money over and in addition to the invoice price of such cars. (R. 1-5.) After a jury trial lasting five days, petitioner was found guilty as charged (R. 158), and on November 10, 1955, he was sentenced to imprisonment for a period of five years (R. 164-165).[1] The Court of Appeals affirmed. (Pet. 15-22.)

The evidence to support the verdict may be summarized as follows:

Having been in the automobile business since 1933, petitioner started to work for one Andy Burger in the fall of 1940. In August, 1945, petitioner was made general manager in charge of Andy Burger Motors, Inc., and he continued to hold this position during the years 1945, 1946, 1947 and 1948. Part of petitioner's responsibilities as general manager was to determine the sales prices of new and used cars. (R. 43, 53.)

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[1] Bail pending appeal was denied by the district judge. (R. 170.) After oral argument, the Court of Appeals for the Eighth Circuit, on November 16, 1955, also denied bail. (Application for Admission to Bail, p. 4.) Application was then made to Mr. Justice Clark, as the Circuit Justice for that circuit. In opposition thereto the Government filed a memorandum contending that no substantial questions were involved on appeal. On December 22, 1955, Mr. Justice Clark denied the application. A renewed application for bail pending appeal was then addressed to the full Court, which denied it on January 30, 1956. *Cooper* v. *United States*, 350 U. S. 957.

During the years 1945 through 1948, petitioner sold several hundred automobiles to Elbert Montgomery and Jude Montgomery, who did business under the partnership name of Montgomery Motor Sales. At petitioner's request, the Montgomerys paid for each of these automobiles partially by check and the remainder by cash. They received from petitioner invoices which reflected only the amounts paid by check. Petitioner told them that he did not want the additional cash prices to appear on the Montgomery Motor Sales books, but that he did want their records to be just like his. During the four years involved, the Montgomery brothers paid cash exceeding the invoice price in the average amount of $200 to $250 per car and in the total amount of approximately $100,000. (R. 75-77, 83-84.)

During the same period petitioner also sold automobiles to Walter Pfaff of Nesser Motors. Petitioner exacted additional cash sums over and above the check and invoice amounts, directed that the Nesser Motors books show the amount of the checks and not reflect currency payments, and stopped occasionally at Pfaff's office to see how the records were being kept. After OPA regulations were removed from automobiles, Pfaff told petitioner that he could not buy any more cars if he had to pay cash over the invoice price for them. Petitioner told Pfaff that it had to be that way or Pfaff could not buy any more cars. (R. 91-92.)

In 1947, petitioner sold nine automobiles to various individual purchasers and exacted cash payments ranging from $165 to $300 above invoice prices. (R.

73-74, 100-101, 103, 104, 107-108, 108-109, 110-111, 114-115, 118-119, 120, 121-122, 123.)

In May, 1949, Special Agent Robert M. Fendorf commenced investigating petitioner's income tax returns along with those of Andy Burger and Andy Burger Motors, Inc. On July 1, 1952, he held an interview with petitioner relative to the investigation. Petitioner appeared voluntarily. (Q. & A. 191-193; Ex. 1-B; R. 37, 62; *infra*, p. 8.) Internal Revenue Agent John F. Corkery and a stenographer were also present. Fendorf administered the oath to petitioner. When questioned, petitioner repeatedly denied receiving money in excess of the invoice prices and stated that all transactions were by check and that no cash was involved. Six weeks later, petitioner reviewed the reporter's transcript of the interview, initialed each page, and certified that it was correct. (Q. & A. 59, 84, 85, 87-91, 103-106, 115, 116, 135-142, 148-150, 161-162, 169, 196, 200; Ex. 1-A, 1-B; R. 28, 29, 30, 37, 38-66, 72-73.)

At the trial the Government established the matters indicated above. Petitioner took the witness stand and testified that he did not wish to change any of his testimony appearing in the reporter's transcript of the interview. (R. 135.) When cross-examined regarding the Government witnesses' testimony contrary to his, petitioner's explanation was that they were mistaken. (R. 140.)

ARGUMENT

While acknowledging (Pet. 5) that the agents conducting the interview advised him of his right under the Fifth Amendment to refrain from answering any question which he thought might incriminate him, petitioner contends (Pet. 7-9) that under the Sixth Amendment (*supra*, p. 2) he had the right to have counsel present at this interview and, more specifically, that the agents were under an affirmative duty to advise him of this right to have counsel present.

This contention is without merit. In the first place, it has long been decided that the rights provided for by the Sixth Amendment accrue only after a criminal prosecution has begun, *Counselman* v. *Hitchcock*, 142 U.S. 547, 563, and this rule has been specifically applied to the right to counsel *Gilmore* v. *United States*, 129 F. 2d 199, 203 (C. A. 10th), certiorari denied, 317 U. S. 631. Cf. *Hanson* v. *United States*, 186 F. 2d 61, 65 (C. A. 8th), as to the privilege against self-incrimination.

Petitioner also maintains (Pet. 9-12) that, if there is no constitutional right to counsel, such a right was accorded him by Congress in the Administrative Procedure Act of 1946, c. 324, 60 Stat. 237, particularly Section 6 (*supra*, p. 3) which provides that any person *compelled* to appear before any agency has the right to counsel. Assuming the Administrative Procedure Act to be applicable to tax investigations authorized by Section 3614 (a) of the Internal Reve-

nue Code of 1939,[2] petitioner's interview plainly did not fall within its purview, since he was not compelled to appear but came of his own free will. The record makes this clear (Ex. 1-B; R. 37, 62):

> Q. 191. Has your appearance here today been voluntary on your part?
>
> A. 191. It has.
>
> Q. 192. Were you compelled to appear for this interview?
>
> A. 192. I was asked to appear for it.
>
> Q. 193. And you came of your own free will and accord?
>
> A. 193. I certainly did.

Moreover, petitioner was in no sense *refused* the right to counsel; nor did he seek to avail himself of any such right. He cites no authority and we have found none holding that a person entitled to a statutory right to counsel, at an interview or "inquiry" such as this, must be informed of it or else the proceeding is entirely vitiated. Petitioner's reliance (Pet. 7-8, 10) on *Johnson* v. *Zerbst*, 304 U. S. 458, *Walker* v. *Johnston*, 312 U. S. 275, and *Wood* v. *United States*, 128 F. 2d 265 (C.A. D.C.) is misplaced. Those cases each involved a criminal proceeding at which the accused was required to appear.

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[2] Though it need not be decided in the present case, there is a question whether the tax investigations authorized by Section 3614(a) of the Internal Revenue Code of 1939, which are wholly factfinding in nature and in which no legal rights of parties are determined, are "agency proceeding[s]" within the meaning of the Administrative Procedure Act. See Section 2(g), Administrative Procedure Act, c. 324, 60 Stat. 237 (5 U.S.C. 1952 ed., Sec. 1001(g)). Cf. *Torras* v. *Stradley*, 103 F. Supp. 737, 739 (N. D. Ga.)

CONCLUSION

No question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1956.

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